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In The

Supreme Court of the United States

October Term, 1984

No. _____

IN THE MATTER OF THE APPLICATION OF JOSEPH BALTER, ASSISTANT PUBLIC DEFENDER OF MONROE COUNTY,

Petitioner,

vs.

JOHN M. REGAN, AS JUDGE OF THE CITY COURT OF ROCHESTER, NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, NEW YORK

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(10922)

HOPP

QUESTIONS PRESENTED

1. Does it violate the Sixth and Fourteenth Amendments to the United States Constitution to hold an attorney in contempt for his good faith refusal to obey an order that he simultaneously represent the defendant in a criminal trial and the principal witness the People intended to call at said trial?

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IN THE MATTER OF THE APPLICATION OF JOSEPH BALTER, ASSISTANT PUBLIC DEFENDER OF MONROE COUNTY,

Petitioner,

vs.

JOHN M. REGAN, AS JUDGE OF THE CITY COURT OF ROCHESTER, NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, NEW YORK

Petitioner Joseph Balter, a licensed attorney admitted to practice before the courts of the State of New York respectfully prays that a writ of certiorari issue to review a final judgment rendered on July 3, 1984 by the New York Court of Appeals, which confirmed a determination that the Petitioner was guilty of contempt of court.

OPINIONS BELOW

The majority and dissenting opinions of the New York Court of Appeals are printed at Appendix at A. The decision issued on July 3, 1984 is not yet published.

The Court of Appeals affirmed the decision and order of the Appellate Division, Fourth Department reported at 97 A.D.2d 953 (4th Dept. 1983 and printed at Appendix B). The Appellate Division, Fourth Department affirmed the determination of contempt of the Rochester City Court (*sub. nom People v. Lennon* reported at 115 Misc.2d 738 [Roch. City Court 1982; a copy is printed at Appendix C]).

STATUTES INVOLVED

The text of the New York Judiciary Law §750(a)(3) is as follows:

> A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others: . . . (3) Wilful disobedience to its lawful mandate.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV, §1:

> No State shall make or enforce any law which shall abridge the privileges of immunities or citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On June 24, 1982 the Petitioner, an Assistant Public Defender for Monroe County, alerted the Respondent, Rochester City Court Judge John M. Regan, that the Monroe County Public Defender represented both Raymond Lennon, the defendant on trial in a criminal case before Respondent, and Christopher Pellitera, the primary witness the People intended to call at said trial. Record pp. 53, 54. Mr. Balter informed the Court that because of the conflicting obligations which the Monroe County Public Defender owed to the two men he had an intolerable conflict of interest necessitating the appointment of substitute counsel for Mr. Pellitera. Record, pp. 53-59. Mr. Balter asserted that the constitutional right of Mr. Lennon to confront and cross-examine witnesses against him was compromised by Mr. Balter's conflicting duties. Record, pp. 54, 55. Additionally, Mr. Balter argued that the conflict of interest deprived Mr. Pellitera (the witness) of his constitutional right to the effective assistance of counsel. Record, pp. 57, 60. Finally, Mr. Balter argued that he could not ethically comply with such an order. Record, pp. 79. The Respondent, however, refused to appoint substitute counsel. Rather, without securing waivers of the right to effective assistance of conflict-free counsel from either Mr. Lennon or from Mr. Pellitera, the Respondent ordered Mr. Balter to proceed to represent both men and to proceed with the trial, with the proviso that Mr. Balter was not to cross-examine Mr. Pellitera about the criminal incident which was the basis of the Public Defender's representation of Mr. Pellitera. Record, pp. 60, 65-71.

The Respondent explicitly recognized that Mr. Balter's refusal to comply with this order was motivated in good faith out of ethical concerns and by concerns for the rights of his clients. Record, pp. 70, 71, 73, 79. However, the Respondent found Assistant Public Defender Balter guilty of criminal contempt in violation of New York Judiciary Law Section 750(A)(3) which defines contempt as an act of "willful disobedience to a lawful

mandate". Record, pp. 82. On September 1, 1982 the Respondent imposed a two hundred fifty dollar ($250.00) fine and conditional discharge as sentence for the contempt. (A copy of the opinion of Respondent holding Petitioner in contempt is printed at Appendix C).

On September 17, 1982 the order of contempt and sentence were stayed pending the determination of a proceeding in the nature of prohibition, brought by Petitioner pursuant to Article 78 of the New York Civil Practice Law and Rules which sought the vacateur of said contempt and sentence. Record, pp. 4.

On November 4, 1983, the Appellate Division, Fourth Department, of the New York Supreme Court, despite finding that Mr. Balter acted in good faith and with a valid reason for believing that he was being ordered to engage in unethical behavior, confirmed the Court's order and dismissed the Article 78 proceeding. *Matter of Balter v. Regan*, 97 A.D.2d 953 (4th Dept. 1983) (printed at Appendix B).

On January 5, 1984 the New York Court of Appeals granted Mr. Balter permission to appeal to that Court. On July 3, 1984 the New York Court of Appeals, by a 5-2 decision, affirmed the decision of the Appellate Division, Fourth Department. (A copy of the majority and dissenting opinions are printed at Appendix A).

REASONS FOR GRANTING THE WRIT

This case raises substantial, and heretofore unresolved, questions as to scope and nature of the Sixth and Fourteenth Amendments. The New York Court of Appeals, in an apparently unprecedented decision, held that an Assistant Public Defender can be punished for contempt for his good faith refusal to violate both the disciplinary rules prohibiting the representation of clients with conflicting interests and the constitutional rights of his clients to receive conflict-free representation of counsel. Thus, this case raises significant questions (1) as to the extent of a

court's authority to order an attorney to represent, in a criminal case, clients with conflicting interests; (2) as to the nature of the right of an accused to be represented by conflict free counsel and of counsel acting in accordance with ethical requirements; and (3) as to the nature of an attorney's right to refuse to act unethically and in a manner violative of his clients' fundamental constitutional rights.

This Court has repeatedly regarded the dilemma between an attorney's obligation to obey court orders and the attorney's concurrent obligation to provide his clients with the effective assistance of counsel required by the Sixth Amendment as one that presents substantial constitutional questions requiring review and resolution through the exercise of certiorari jurisdiction. *See, e.g., Maness v. Meyers,* 419 U.S. 449 (1975) (holding that an attorney cannot be held in contempt for advising a client, in good faith, not to produce subpoenaed materials which the attorney believed privileged pursuant to the Fifth Amendment); *Hickman v. Taylor,* 329 U.S. 495 (1947) (involving the jailing of an attorney who refused to reveal a confidential communication from his client); *Watts v. Sachs,* 190 U.S. 1 (1903) (in which this Court vacated a contempt against an attorney because there was no evidence that the attorney had not been acting in good faith in the discharge of his duty as counsel); *Fisher v. Pace,* 336 U.S. 155 (1949); See also, *In re Green,* 369 U.S. 689 (1962).

As in the above cited cases, the issue raised by Petitioner is not, whether an individual attorney will suffer the stigma associated with a criminal contempt judgment against an attorney. Rather, the issue is whether attorneys throughout this country can be punished for contempt for a good faith decision not to act unethically by simultaneously representing the defendant and the principal prosecution witness in a criminal case. As described below, the decision of the New York Court of Appeals is in contravention of holdings from this Court concerning both the scope of the right to counsel and power of the Court to punish the refusal

to obey orders violative of fundamental constitutional rights and not subject to adequate precompliance or appellate remedy.

In *Holloway v. Arkansas,* 435 U.S. 475 (1978) this Court reaffirmed its holding in *Glasser v. United States,* 315 U.S. 60 (1942) that

> "the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer should simultaneously represent conflicting interests. . . ." *Holloway v. Arkansas,* 435 U.S. 475, 482 quoting with approval *Glasser v. United States,* 315 U.S. 60, 70.

Furthermore, this Court in *Holloway* reaffirmed and emphasized its holding in *Glasser* that:

> "(o)f equal importance with the duty of the court to *see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by* ***insisting, or indeed, even suggesting, that counsel undertake to concurrently represent interests which might diverge from those of his first clients, when the possibility of that divergence is brought home to the court.*** *" (emphasis in original) Holloway v. Arkansas,* 435 U.S. at 484, 485 quoting with approval *Glasser v. United States,* 315 U.S. 71, 76.

This Court pointed out the impossibility of fully serving two masters with conflicting interests (paraphrasing **Matthew** 6:24) and held that, absent a finding that an attorney is acting in bad faith, an attorney's request for the appointment of separate counsel based on his representations of a conflict of interest should be granted. *Holloway v. Arkansas,* 435 U.S. 475, 485, 486. It should be emphasized that in this case all three levels of the New York Courts all explicitly held that Petitioner was acting in good faith. Record, pp. 70, 71, 73, 79; Appendix A; Appendix B.

These Supreme Court holdings, setting forth in the strongest and most unequivocal terms the rule that courts do not have the

power, over objection, to force an attorney to represent conflicting interests, are based on the realization that an attorney cannot fulfill a client's constitutional right to counsel "when the advocate's conflicting obligations have effectively sealed his lips on crucial matters". *Holloway* at 490. The evil of conflicting representation is that an attorney is required to do for one client that which he is compelled to refrain from doing in order to represent another client. The holdings of this Court set forth in *Holloway* and *Glasser* for dealing with the evils of the simultaneous representation of clients with conflicting interests have been applied with full force to situations involving the concurrent representation of a criminal defendant and the principal witness against him. *See, e.g., Stephens v. United States,* 595 F.2d 1066 (5th Cir. 1979); *United States v. Alvarez,* 580 F.2d 1251 (5th Cir. 1978). The conflicting interests of an attorney with two clients in such a position is apparent. On behalf of the defendant it is the duty to make the witness look as badly as possible, thereby discrediting his testimony; on behalf of the witness it is his duty to give complete support and (especially where the witness, such as Christopher Pellitera, in the case at bar, is awaiting sentence) to prepare and counsel the witness so that his veracity is not impeached. (For a detailed listing of the contrasting ethical obligations which Petitioner Balter owed to his two clients Raymond Lennon [the defendant] and Christopher Pellitera [the prosecution witness], see Appendix D).

Despite the unequivocal admonition in *Holloway, supra,* the Respondent ordered that Petitioner to *concurrently* represent clients with conflicting interest.[1]

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1. Nor could the court's order that Petitioner refrain from cross-examination of the chief prosecution witness (his client) about a pending criminal charge, (Record, pp. 60, 63-64) cure the conflict of error. Not only did such order violate the constitutional right of the defendant (also his client) to cross-examine and confront adverse witnesses (*See, e.g., Davis v. Alaska,* 415 U.S. 308 (1974); *Pointer v. Texas,* 380 U.S. 400 (1965)), but it did not alleviate Petitioner's obligation to seek to impeach the witness on matters other than the pending charge.

Petitioner contends that to punish as contempt his refusal to obey an order to act unethically (see, e.g., Code of Professional Responsibility DR 5-105(B), DR 2-110(2)) by concurrently representing a defendant and the key prosecution witness in a criminal case, contravenes this Court's holding in *Holloway v. Arkansas,* 435 U.S. 475 (1978) and *Glasser v. United States,* 315 U.S. 60 (1942) as to the right tc the assistance of conflict free counsel.

Nor can the general rule that court orders must be obeyed, even if erroneous, justify holding Petitioner Balter in contempt for refusing to represent conflicting interests in a criminal case. Rather, this Court has consistently held that an order, such as one that Petitioner unethically represent clients with conflicting interests, which is violative of fundamental constitutional rights and is either not subject to precompliance review or to an appellate remedy sufficient to entirely cure the constitutional violation, is unlawful, and the non-compliance with such an order is not punishable as contempt. *See, e.g., Maness v. Meyers,* 419 U.S. 449 (1975); *United States v. Ryan,* 402 U.S. 530, 532-533 and f.n. 4 (1971); *Hamilton v. Alabama,* 376 U.S. 650 (1964); *Johnson v. Virginia,* 373 U.S. 61 (1963); *Gibson v. Fla. Legis. Investig. Comm.,* 372 U.S. 539 (1963).

In cases such as the case at bar, in which there was no opportunity for precompliance review of an order, this Court has repeatedly held that a person cannot be held in contempt for refusing to comply with an order which violates fundamental constitutional rights. Thus, for example, in *Hamilton v. Alabama,* 376 U.S. 650 (1964) the Court vacated a contempt finding imposed against a black witness who refused to comply with an order to testify because she was not treated with the same respect as white witnesses, and in *Johnson v. Virginia,* 373 U.S. 61 (1963) the Court vacated an order of contempt imposed upon a black courtroom spectator who refused to comply with a court order that he refrain from sitting in a seat designated for whites.

Also relevant to the case at bar are those cases which hold that the disobedience of an order violative of constitutional rights is not punishable as contempt if the normal appellate process could not cure all the harm created by compliance with the error. *See, e.g., Maness v. Meyers,* 419 U.S. 499, 462, 463 (1975). *In re Grand Jury Proceeding,* 601 F.2d 162 (5th Cir. 1979); *State v. Gasen,* 48 Ohio App.2d 191 (Ohio C.A. 1976). Thus, for example courts have held that an attorney cannot be held in contempt for advising a client to disobey an order to produce certain materials in court, where such materials were protected by the Fifth Amendment privilege, (*Maness v. Meyers, supra*), and that an attorney could not be held in contempt for refusing to obey an order to proceed with trial when he had just been appointed and was not familiar with the case (*State v. Gasen, supra*). As the Court held in *State v. Gasen, supra* at 508, a determination as to whether the refusal to obey an order is punishable as contempt depends, in part, on whether there is available ". . . complete relief from unjustified, unreasonable, or illegal orders may be accorded the aggrieved parties (whether counsel, his clients, or both) upon direct appeal."

The New York Courts based their affirmance of the criminal contempt on their claim that any prejudice which would have resulted from obedience to the order was curable on appeals. Appellant urges that this conclusion ignores the full nature of the prejudice which would have resulted from compliance with the order that he break his ethical responsibilities and simultaneously represent the defendant and chief prosecution witness in a criminal case. As described below, although there exists an appellate remedy for a defendant who is represented at trial by an attorney who also represents the chief prosecution witness, there exists *no* appellate remedy for the violation of said witness's right to have counsel with undivided loyalty (more specifically, for the right not to be cross-examined and, thereby impeached by his own counsel) or for the attorney's due process right not to be forced to act unethically. For example, the witness, Pellitera, was

not granted immunity for his testimony at the *Lennon* trial. Since Balter had access to statements which Pellitera had given in confidence to the public defender's office, Balter's cross-examination, in the words of the two dissenting judges at the New York Court of Appeals, "could have led to the disclosure of confidential information about the witness, a breach irreparable on appeal." *Matter of Balter v. Regan,* ____ N.Y.2d ____ (July 3, 1984) (copy attached). Appellant was thus justified in declining to comply with the Judge Regan's order because had he complied, this violation of Pellitera's rights would have evaded appellate remedy. *See Maness v. Meyers,* 419 U.S. 499 (1975) (in which this Court held that an attorney's disobedience of an order which required revealing of privileged material is not punishable as contempt).

Mr. Pellitera also lacked an effective remedy for prejudicial, though non-incriminating, disclosures revealed in violation of the attorney-client relationship. For example, Petitioner Balter might have elicited on cross-examination of his client the admission that Pellitera has a gambling habit, or a drinking problem or owes large debts. Perhaps more importantly, unbeknownst to Pellitera or his counsel, revelation of Pellitera's prior bad acts might influence the district attorney to seek a stiffer sentence in Pellitera's criminal case, a change of heart which would be unlikely to appear on the record of Pellitera's appeal. Further, Pellitera's right to the assistance of counsel in preparing his Lennon testimony was compromised by the conflict, yet no appellate remedy exists for the fact that his testimony might thereby be less valuable to the prosecutor. Similarly, while conflict-free counsel might have been more insistent and successful in obtaining immunity or favorable dispensation in exchange for Pellitera's testimony, Balter was unlikely to do so, since Lennon sought to discourage not encourage Pellitera's cooperation. Pellitera had no appellate avenue by which he could recapture this missed opportunity.

Thus, Appellant contends that just as in *Maness* or *Gasen*, there existed no adequate appellate remedy for the order that he simultaneously represent the defendant and the chief prosecution witness in a criminal case.

Not only the Sixth Amendment's guarantee of the right to the assistance of conflict free counsel, but also, the Fourteenth Amendment's due process protections are offended by holding the Petitioner in contempt for his refusal to represent conflicting interests in a criminal court.

As part of the limitation on the power of a court to enforce an order which violates the Fourteenth Amendment's guarantee of due process, courts have consistently held that a court cannot use its contempt powers to enforce an order, such as the one which is the subject of this appeal, that an attorney perform in a manner which the attorney is not ethically capable of performing. *See, e.g., United States v. Wendy,* 575 F.2d 1025 (2nd Cir. 1978); *In re Kozlov,* 79 N.J. 232 (1979); *Easley v. State,* 334 S.E.2d 630 (Dist. Ct. Fla. 1976); *State v. Gasen,* 48 Ohio App.2d 191 (Ohio C.A. 1976).

Long ago, the United States Supreme Court recognized that the societal need for an independent bar precludes the punishment of an attorney for contempt for his good faith actions:

> "In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interest of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow for the application of any other general rule." *Watts v. Sachs,* 190 U.S. 1, 29 (1903).

The decisions of the New York courts in this case have dangerously altered the powers and duties of judge and attorney. Our society, which recognizes the fundamental nature of the right to counsel as the means for insuring the implementation and enforcement of numerous other rights, cannot afford to have attor-

neys punished for refusing to act unethically. The harm which would flow if attorneys could be lawfully ordered to proceed with representation while having a conflict of interest is "irreparable" by any standard. If attorneys can be compelled to act unethically, our legal system would not longer be entitled to our trust and faith. Judges cannot constitutionally be imbued with the authority to compel obedience to orders which require unconstitutional and unethical actions, not fully curable on appeal.

Hence, the same considerations that prompted this Court to grant certiorari in *Maness v. Meyers,* 419 U.S. 449 (1975) and *Fisher v. Pace,* 336 U.S. 155 (1949) necessitate review of the contempt judgment in this case.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully prays that the Writ of Certiorari be granted.

DATED: August 24, 1984

Respectfully submitted,

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APPENDIX

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No. _____

IN THE MATTER OF THE APPLICATION OF JOSEPH BALTER, ASSISTANT PUBLIC DEFENDER OF MONROE COUNTY,

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APPENDIX A

STATE OF NEW YORK

Court of Appeals

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4 No. 357

In the Matter of Joseph Balter, Assistant Public Defender of Monroe County,

Appellant,

v.

John M. Regan, as Judge of the City Court of Rochester, &c.,

Respondent.

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(357) Edward J. Nowak, Monroe County Public Defender (Brian Shiffrin & Peter Braun of counsel) for appellant.

Robert Abrams, Attorney General (Betsy Broder & Peter H. Schiff of counsel) for respondent.

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

MEMORANDUM

The judgment of the Appellate Division should be affirmed, with costs.

Petitioner, an assistant public defender, was ordered by a City Court Judge to proceed to trial representing a criminal defendant, in spite of the fact that petitioner's office was also representing the People's primary witness in an unrelated criminal pro-

ceeding. Both petitioner and the People were further directed not to question the witness on the criminal charge or the plea agreement he had reached. Petitioner refused to proceed, believing that to do so would involve an ethical violation on his part and a denial of effective assistance of counsel to his client. By this article 78 proceeding, petitioner has challenged the resulting adjudication of criminal contempt.

Petitioner argues that the court's order was not a "lawful mandate" that he was required to obey (Judiciary Law § 750, subd [A], par 3), because the order required him to represent a client in violation of both the disciplinary rules concerning the representation of clients with conflicting interests and the client's constitutional right to counsel. Notwithstanding petitioner's good faith belief that the court's order raised this conflict of interest, we agree with the Appellate Division that the court's order was not thereby rendered unlawful. However misguided and erroneous the court's order may have been, petitioner was not free to disregard it and decide for himself the manner in which to proceed (*Maness v Meyers,* 419 US 449, 458). The prejudice sought to be avoided by petitioner was not irreparable; indeed, in both the case of the defendant and the witness, any prejudice could have been remedied through the appellate process.

The issues raised concerning the propriety of the penalty imposed are not set forth in the petition and, accordingly, are not preserved for review by this court.

Matter of Balter v Regan
Case No. 357

Kaye, J. (dissenting)

Petitioner, an attorney in the Monroe County Public Defender's Office, represented Raymond Lennon, an indigent charged with serveral misdemeanors. When petitioner discovered, just after jury selection, that the chief prosecution witness against Lennon would be Christopher Pellitera, he informed the

court that his office represented Pellitera in a pending unrelated criminal action and, noting the possible impropriety and inherent unfairness of joint representation, asked the court to appoint independent counsel for the witness. Instead, the court directed petitioner to proceed with the Lennon trial and prohibited him from questioning Pellitera about the pending criminal charges against him, limiting cross-examination to other prior bad acts, arrests or convictions. This ruling violated Lennon's right to confront witnesses against him (see *Davis v Alaska,* 415 US 308), and denied both Lennon and Pellitera the right to the effective assistance of counsel (see *Holloway v Arkansas,* 435 US 475; *People v Gomberg,* 38 NY2d 307; *People v Frisbie,* 70 AD2d 1053). The ruling also forced petitioner to breach his ethical responsibility by presenting him with a choice of either declining to cross-examine Pellitera, thereby violating his duty to Lennon, or seeking to impeach Pellitera as directed, a violation of his duty both to Lenon and to Pellitera, which could in addition have led to the disclosure of confidential information about Pellitera, a breach irreparable on appeal.

The importance of obedience to orders of a trial court cannot be overstated. But this concern, however vital, should not cause this Court to overlook a rare instance when, as here, a trial court has so clearly abused its considerable power as to leave counsel with no reasonable alternative (see, e.g., *People v Giglio,* 74 AD2d 348 [Hopkins, J.]; *DeSalvo v Kaplan,* 52 AD2d 570; *United States v Wendy,* 575 F2d 1025; *State v Gasen,* 48 Ohio App2d 191). Petitioner pleaded with the court in good faith to adjourn the Lennon trial so that independent counsel could be assigned for Pellitera. Faced with the court's directive to proceed, he chose, in a most respectful manner and without regard to his personal interests, not to betray the interests of his clients.

He should not be punished for that.*

* * * * * * *

Judgment affirmed, with costs, in a memorandum. Judges Jasen, Jones, Wachtler, Meyer and Simons concur. Judge Kaye dissents and votes to reverse in an opinion in which Chief Judge Cooke concurs.

Decided July 3, 1984

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* As noted in *United States v Wendy,* 575 F2d 1025, 1030 *supra,* "contempt by an attorney is always a serious matter. While simple rebuke or more serious censure by the court might not have the same effect as in the more tightly knit Bar of England (footnote omitted), the more serious exercise of the contempt power is awesome in its implications. A citation is likely to afflict the contemnor with a 'stigma of antisocial conduct.' Note, *Procedures for Trying Contempts in the Federal Courts,* 73 Harv.L.Rev. 353, 355 (1959). For a lawyer seeking admission to other bars or to practice before federal agencies, a citation might have considerable economic consequences."

APPENDIX B

MEMORANDA, Fourth Dept., November, 1983

32 In the Matter of JOSEPH BALTER, as Assistant Public Defender of Monroe County, Petitioner, v JOHN M. REGAN, as Judge of the City Court of Rochester, Respondent. — Determination unanimously confirmed and petition dismissed, without costs. Memorandum: In this proceeding pursuant to CPLR article 78 we confirm the determination of Rochester City Court finding petitioner in contempt for willful disobedience to its lawful mandate (Judiciary Law, § 750, subd A, par 3). Because no substantial evidence question was presented, this matter was improperly transferred to this court (CPLR 7803, subd 4; 7804, subd [g]). However, as the record is sufficient for us to review the determination, we are required in the interest of judicial economy to reach the merits (*Matter of 125 Bar Corp. v State Liq. Auth.*, 24 NY2d 174, 180; *Matter of Circle Cts. v Lane,* 29 AD2d 620). Although it is clear from the record that petitioner acted in good faith and that there was a valid basis for his belief that he was faced with a conflict of interest, that fact did not relieve him of the obligation to obey a lawful mandate of the court. "The orderly and expeditious administration of justice by the courts requires that 'an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.' [citation omitted] *** Such orders must be complied with promptly and completely, for the alternative would be to frustrate and disrupt the progress of the trial with issues collateral to the central questions in litigation" (*Maness v Meyers,* 419 US 449, 459). The order was a valid exercise of the court's jurisdiction (cf. *Matter of Kavanagh v Vogt,* 58 NY2d 678), and was not otherwise void on its face. Consequently, it was incumbent upon petitioner to obey the order and, if it constituted error, to pursue his remedy through the appellate process (see *Maness v Meyers, supra,* pp 458-460; *Margulies v Margulies,* 42 AD2d 517, app dsmd 33 NY2d 894; 21 NY Jur 2d, Contempt, § 30; Ann., 12 ALR2d 1059, 1107-1115). (Article 78 proceeding transferred by order of Supreme Court, Monroe County, Tillman, J.) Present — Hancock, Jr., J.P., Denman, Boomer, Green and O'Donnell, JJ.

APPENDIX C

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PEOPLE v. LENNON
Cite as, City Ct., 454 N.Y.S.2d 621

115 Misc.2d 738

PEOPLE of the State of New York
v.
Raymond LENNON, Defendant.

CITY COURT, CITY OF ROCHESTER
v.
Joseph BALTER, Esq., Assistant Public Defender of Monroe County, Respondent.

Proceeding in Summary Criminal Contempt under Article 19 of the Judiciary Law.

City Court of Rochester,
Criminal Branch.

Sept. 1, 1982

After public defender willfully disobeyed a direct order to proceed in a criminal case, the Rochester City Court, Criminal Branch, John Manning Regan, J., held that the public defender was guilty of criminal contempt, notwithstanding that the basis for his refusal to proceed was that he had a conflict of interest in that he was in the position of representing a prosecution witness in an unrelated matter.

Order accordingly.

Ruben M. Garcia, Monroe County Asst. Dist. Atty., for the People.

Edward J. Nowak, Public Defender, for Raymond Lennon.

Edward J. Nowak, Monroe County Public Defender, for Joseph Balter.

DECISION

JOHN MANNING REGAN, Judge.

The following constitutes the written findings of fact which bring this case within the provisions of § 755 of the Judiciary Law and states the Court's conclusions of law in respect to the offense for which the respondent has been found guilty of contempt of court. It also constitutes the order and specific sentence and punishment which the Court imposes.

FINDINGS OF FACT

On June 24, 1982, this Court, at Trial Term, called the case of *People v. Raymond Lennon* for trial by jury. The charges against Lennon involved falsely reporting an accident, leaving the scene, and driving while his license was revoked. Both counsel answered "ready".

Selection of the jury began about 10:00 a.m. and was completed about 12:45 p.m. During voir dire, the Assistant District Attorney announced his intention to call one Christopher Pellitera to the stand as a fact-witness for the prosecution. This announcement brought no response from any juror, nor, during the morning session, from defense counsel, Joseph Balter, Esq. the Assistant Public Defender who represented Lennon and who is the respondent herein.

However, after the trial had recessed for lunch, and just before the afternoon session was to begin (about 1:50 p.m.) the Court conferred in chambers at counsel's request with the District Attorney and with defense counsel, Mr. Balter. Both attorneys advised that the fact-witness, Pellitera, had been arrested and arraigned that very morning on burglary and larceny charges in Rochester City Court. Moreover, the arraigning judge had assigned the Monroe County Public Defender's Office to defend

Pellitera on those felony charges (Assistant Public Defender Zambito).

For these reasons, Assistant Public Defender Balter moved before this Court to be relieved of the responsibility to represent Mr. Pellitera, alleging that since his felony charges were pending and unresolved, he was "in a position of representing both defendant Lennon, and a witness for the prosecution", and that since such "representation of the defendant in the instant case would require vigorous cross-examination of Pellitera", the situation had created "an inherent conflict". Since the criminal proceedings against Pellitera were still pending, any confidential communication from Pellitera to the Public Defender, Zambito, could not be used against him for the purpose of cross-examination in the *Lennon* case.

The Court ascertained in a series of inquiries that Mr. Balter, himself, was unaware of any information Pellitera may have told Mr. Zambito, and thus he could not use any such confidences in cross-examination of the witness.

Mr. Balter then moved to have the Court appoint new counsel for Mr. Pellitera and to permit Pellitera to consult with him before testifying in the *Lennon* case.

The District Attorney objected to these motions and asked the Court to direct the Public Defender to withdraw from the *Pellitera* case, rather than the *Lennon* case, in the event of any conflict. The prosecutor also argued that there was no actual conflict demonstrated at this point because Balter had no knowledge of what Pellitera may have told Zambito; and that, further, there was no *inherent* conflict whatsoever in the situation.

After these arguments concluded, the Court ruled that Mr. Balter should tell his superior, the Public Defender, to decide whether to withdraw from the *Pellitera* case, and to move to do so before the judge who had assigned him. Moreover, the Court ruled that neither the prosecution nor the defense could question

Mr. Pellitera about any charge or matters which were then pending against Pellitera. The charges had come about from events wholly unrelated to the charges against *Lennon* and the Court's ruling was intended to protect Pellitera's rights against self-incrimination.[1]

* * *

In response to these rulings, and counsel's exceptions to them, Mr. Balter replied:

> I think it has gone beyond exception at this point. I'm not prepared to proceed until Mr. Pellitera has assigned counsel and has an opportunity to meet with an assigned counsel. Tr. p. 15, lines 6-16.

When the Court overruled Mr. Balter, he again replied:

> Your honor. At this point, that's not my objection. That's the position that I'm taking as an officer of the Court. I will not go forward. See Tr. p. 15, lines 16-19.

And again he said:

> Your honor, with all due respect, if it's necessary for the Court to hold me in contempt, be that the case, but, I am not going to go on with this case. Tr. p. 16, lines 1-4.

Following these replies, the Court recessed. In subsequent exchanges on the record after the recess, respondent, Balter, persisted in his refusal to proceed. Finally, the Court said to Balter:

> Now, you are telling me you will not continue with the trial. If you do not continue with the trial I must grant a mistrial. I

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1. Actually, at the time these events occurred in the *Lennon* trial, Zambito had already pleaded Pellitera guilty of misdemeanors, reduced from the felony charges. But no one in the *Lennon* case knew this, nor did anyone learn of it until after the Court had declared a mistrial.

must. If I grant a mistrial, I will punish you summarily for contempt and for your failure to obey my order to continue. Tr. p. 24, lines 16-21.

Another recess proved equally fruitless in respect to changing the respondent's mind about his refusal to proceed. The Court advised that an appeal was readily available as an appropriate remedy for any errors of law, but that:

> It's not a question of whether or not I'm right or wrong on the law. It's a question of the fact that this is the procedure that we follow. By law, I have made my decision and ruling as a judge, using as much good faith as you are in making your objection. The point is that I am the judge and I'm directing you to proceed. Tr. pp. 29, lines 21-23, p. 30, lines 1-5.

Notwithstanding these importunings, the respondent answered: "I can't proceed." Whereupon the Court found him guilty of contempt and sentenced him to a fine of $250.00 and ordered him to show cause why he should not be sent to jail. The Court stayed execution of its judgment for one week, and its stay of execution has been continued pending the writing of this decision.

CONCLUSIONS OF LAW

Respondent has continuously defended his conduct on the basis of an inherent and irreconcilable conflict between his vigorously pursuing Lennon's right to the effective assistance of counsel and confrontation of the witnesses against him in cross-examination, and his simultaneous duty in representing Pellitera not to use information acquired in a confidential attorney/client relationship with Pellitera against *him*. Moreover, at the trial, Pellitera's right to be free from self-incrimination might possibly conflict directly with Lennon's right to impeach him on cross-examination. All these rights belong to both *Pellitera* and *Lennon* by virtue of the Fifth, Sixth

and Fourteenth Amendments to the U.S. Constitution and, accordingly, respondent Balter claimed to be justified in refusing to proceed.

The Court, at the trial, chose to protect Pellitera's Fifth Amendment rights against self-incrimination in advance by ordering both counsel not to question him about the pending charges. But it chose to defer judgment on the question of any conflict with Lennon's Sixth Amendment rights to counsel and confrontation until Pellitera had taken the stand and had testified for the People.

Respondent's refusal to proceed nullified the Court's decision and caused a mistrial.

* * *

The first issue, then, is whether the defense of legal justification can be urged in a proceeding in summary contempt under Article 19 of the Judiciary Law. Respondent says his own professional judgment to protect the constitutional rights of his two clients takes precedence over his duty to obey the Court, and justifies his refusal to proceed to trial.

Whether justification exists as a defense to summary criminal contempt is a question of first impression. The statute, *Penal Law* § 35.05 defines justification generally as follows:

> ... conduct which would otherwise constitute an offense is justifiable and
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> not criminal when: 1. Such conduct is required or authorized by law or by a judicial decree or is performed by a public ser-

vant in the reasonable exercise of his official powers, duties, or functions...[2]

The Court will isolate the argument further. Respondent Balter urges justification because he believes his conduct was required or authorized by constitutional law; specifically, he interposes his judgment as to the manner in which his client's constitutional rights shall be preserved during trial between the Court's order to proceed and his duty to obey that order. He concludes that his primary duty is to his clients and to his own professional judgment. Therefore, he says, the Court's order to proceed was lawfully disregarded.[3]

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2. Penal Law Section 10.00, subparagraph 15 defines a "pubic servant" as any employee of the state or political subdivision . . . either elected or designated. Obviously, respondent Balter is a public servant as so defined. However, the Court shall disregard that classification in this case because Balter was acting as an attorney-at-law and officer of the Court and that status alone will govern this case. Otherwise, the statute would grant to public attorneys a defense not accorded to private attorneys during the discharge of identical duties to the Court — a situation legally intolerable under these circumstances.

3. The law has learned many bitter lessons, but none more bitter than whether to sanction defiance to established legal authority. The Nuremberg trials fixed capital criminal guilt on government officials who pleaded the defense of *obedience* to orders from higher legal authority. If the law can find them guilty for obeying orders, then the law must provide a defense of justification for disobedience to orders. They cannot be punished for both.

"Nor should such a defense be recognized as the obsolete doctrine that a head of state is immune from Legal liability. . . . We do not accept the paradox that legal responsibility should be least where power is greatest. We stand on the principle of responsible government. . .

With the doctrine of immunity of a head of state usually is coupled another, that orders from an official superior protect one who obeys them. It will be noticed that the combination of these two doctrines means that nobody is responsible. Society as modernly organized cannot tolerate so broad an area of official irresponsibility."

Report to President Truman from Justice Robert H. Jackson, Chief U.S. Counsel in the Prosecution of Axis War Criminals, 7th June 1945.

In this case, the Court faces a respondent who urges a defense to his disobedience — justification. Because I agree with what Justice Jackson wrote in 1945, I must, consistent with that belief, afford the respondent his defense.

Justification as a codified legal defense to criminal behavior is a relatively recent development in New York. It first appeared in the Laws of 1965, ch. 1030 during the general revision of the old Penal Law. It normally applies in prosecutions for violent crimes as variations on the defense of self-defense. But although six subdivisions of the statute, by their language, apply only to physical force situations, the first subdivision applies generally to all offenses. That means justification, by statute, is a defense to the offense of Criminal Contempt. *Penal Law*, § 215.50.

[1] This Court must therefore conclude that justification is also a defense to proceedings in summary criminal contempt under Article 19 of the Judiciary Law, because the Supreme Court of the United States has held that the offenses of criminal contempt under *Penal Law* § 215.50 and the offenses of criminal contempt under *Judiciary Law* § 750 are the same. *Colombo v. N. Y.*, 405 U.S. 9, 92 S.Ct. 756, 30 L.Ed.2d 762 (1971). Our Court of Appeals has since acknowledged the identity of these two statutory offenses, *People v. Colombo*, 31 N.Y.2d 947, 341 N.Y.S.2d 97, 293 N.E.2d 247 (1972).[4]

The questions which remain then are:

(1) What are the elements of the defense of justification in this criminal contempt prosecution

and

(2) Have the elements been established here.

[2] This case does not invoke circumstances such as lack of notice, understanding, impossibility and the like. The respondent admits willful disobedience to the order of the Court. His defense

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4. Actually, the *Colombo* cases held that conviction and punishment under Article 19 barred subsequent prosecution on the same facts under *Penal Law* § 215.50, for criminal contempt, notwithstanding the provisions of § 215.55 of the Penal Law which permitted double prosecution.

pits one set of legal rules against another and ask to know which shall prevail. It is the judgment of the Court that, in this case, the order to proceed to trial transcended the personal, good faith decision of the respondent to disobey for the sake of his duty to his client.

Willful disobedience to the direct order of a trial judge to proceed with the trial of a case committed in his presence is a grave violation of the established rules of trial procedure. Were this Court to suffer such disobedience in any but the most exceptional cases, the orderly administration of criminal justice would surely collapse. Only the threat of an immediate, irreparable injury to an obvious and fundamentally valuable right could justify such behavior — especially such behavior by a lawyer. The impact of the threat must be equivalent philosophically, to the impact of the physical threat to life in cases of self-defense. Thus the question here is whether the conflicts of interest asserted in this case meet the test of immediate, irreparable injury to an obvious and fundamentally valuable right.

Respondent's citations to *Holloway v. Arkansas,* 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) and *Glasser v. United States,* 315, U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942) to show that these types of threats existed in the supposed conflicts he faced are totally misplaced. In each of those cases, the issue involved was defense counsel's simultaneous representation of multiple defendants accused of the same crimes. Representation of codefendants by the same attorney during the course of a criminal trial has long been held the most commonplace example of inherent conflicts of interest. The American Bar Association's Code Provisions publishing the standards for the Conduct of Criminal Justice has erected a clear-cut rule against it. See *ABA Standards for Criminal Justice Rule 3-3.5 (1975).* But even this rule allows exceptions for informed consent in unusual situations.[5] Nevertheless codefendants are not at all involved in this

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5. The three dissenting Justices in *Holloway* opposed any adoption of a *per se* or *ipso facto* rule in conflict of interest cases.

case. Moreover, *Holloway* specifically disavowed the idea that an attorney's conscientious assertions of a conflict of interest *controlled* the trial court's authority. The Court held:

> The State argues, however, that to credit Hall's representation to the trial court would be tantamount to transferring to defense counsel the authority of the trial judge to rule on the existence or risk of a conflict [of interest].
>
> . . . . .
>
> Our holding [does not] preclude a trial court from exploring the adequacy of the basis of defense counsel's representations regarding a conflict of interests without improperly requiring disclosure of the confidential communications of the client. See 435 U.S. at pp. 486-487 [98 S.Ct. at pp. 1179-1180] (1978).

Holloway posits two conventional and widely recognized conflict of interest situations. The first, a single attorney simultaneously representing codefendants in a criminal case; and the second, the use of confidentially acquired and/or disclosed information from one client against the interest of another client, or the interest of that same client on behalf of another client. Neither situation obtains here.

Here Lennon is the client entitled to immediate representation. He is the person on trial. Pellitera is a fact-witness for the prosecution. As a witness, he is not charged, nor is he in a setting even requiring legal representation. At least, not yet. Until he testifies as a fact-witness, his legal interests are potential only. What Pellitera was entitled to *as a witness* was freedom from self-incrimination, not freedom from his duty to testify. Beforehand therefore, the Court prohibited counsel from questioning Pellitera on any facts surrounding the

pending charges of burglary and larceny. Whether that ruling would have unduly restricted Lennon's right to impeach Pellitera

on cross-examination had to abide the event of his direct testimony. It could not be assumed or surmised or even predicted what that direct testimony might be.

Additionally, the Court and the respondent had already eliminated, before the order to proceed to trial was issued, any question of breach of confidentiality.

Thus, at the time the Court ordered the respondent to proceed both familiar examples of conflict of interest, which *Holloway* had recognized, had been removed from the case. And since *Holloway* had never held that defense counsel's personal judgment usurped the trial court's judgment on the question of whether a conflict of interests exists, the respondent's defense of justification cannot meet a test requiring a demonstrated threat of immediate, irreparable injury to an obvious and fundamentally valuable constitutional right.

* * *

Respondent also contends that Canon 9 of the Code of Professional Responsibility (see Judiciary Law, Article 15, Appendix I) prohibiting even the appearances of professional impropriety sustains his refusal to proceed with the trial, citing as authority *People v. Shinkle*, 51 N.Y.2d 417, 434 N.Y.S.2d 918, 415 N.E.2d 909 (1980).

Shinkle held that a former public defender turned prosecutor could not prosecute, nor could anyone in the office with which he was associated prosecute, any person he had previously represented as a public defender.

What analogy there may be between *Shinkle* and this case is putative and murky at best. In a City the size of Rochester, the public defender will confront as witnesses many of the persons he has represented as defendants. Does that simple fact preclude his effectiveness at cross-examination? Does it warrant the current defendant's suspicion of less-than-adequate representation?

Nonsense. An appearance of professional impropriety does not imply a presumption of dishonor. As the Second Circuit recently remarked:

> An appearance of impropriety is * * * too slender a reed on which to grant a motion for an attorney's disqualification. See *Board of Education of City of N. Y. v. Nyquist,* 590 F.2d 1241 (C.A.2d 1979)

Clearly, also, it is too slender a reed on which to found the defense of justification to the willful violation of a court order to proceed with the trial of a case, which violation, it must be observed, creates a far greater appearance of impropriety.

For the above reasons, the Court dismisses the defense of justification and finds the respondent guilty of contempt of court in violation of § 750 of the Judiciary Law.

SENTENCE AND PUNISHMENT

In accordance with § 751 and § 755 of the Judiciary Law, the Court prescribes as punishment the maximum fine of $250.00, to be paid from personal, not public, funds within 30 days from the date of service and entry of this Order; and a conditional discharge of one year, the condition being, that pending final discharge, respondent not give any other tribunal probable cause to cite him for contempt.

The Court has heard respondent on the question of incarceration. It finds that Mr. Balter has had some prior experience as a trial attorney but has been admitted to practice for less than five years. Given these facts, and his good faith intentions to represent his clients' interests, albeit somewhat overzealously, the Court finds that no sentence of imprisonment is indicated. Nor can the Court condone or support any further consequences, such as suspension or disbarment, cf. *Matter of Isserman,* 345 U.S. 286, 73 S.Ct. 676, 97 L.Ed. 1013 (1953), 29 N.Y.U.L.Rev. 517 (1953) from these findings and from this judgment.

APPENDIX D

THE CONTRASTING ETHICAL OBLIGATIONS OF JOSEPH BALTER VIEWED FROM THE VANTAGE POINT OF THE EXPECTATIONS OF HIS CLIENTS, RAYMOND LENNON AND CHRISTOPHER PELLITERA.

LENNON'S LEGITIMATE EXPECTATIONS FROM COUNSEL

1. LENNON was entitled to loyal and zealous representation by Balter DR5-101; DR5-105; DR7-101
   Yet:
   a) Lennon was the defendant in *People v. Lennon.* Protecting Lennon meant attacking Pellitera.
   c) Protecting dLennon meant seeking full exoneration on the criminal charges for which Pellitera was the chief prosecution witness.
2. LENNON was entitled to freely dicuss all facts and circumstances of his case with Balter.
3. LENNON was entitled to the full assurance that his attorney client communications would be kept in strictest confidence.
4. LENNON was entitled to rely on the attorney-client evidentiary privilege as to certain matters and upon the proscription against revelation of secrets and confidences by Balter as to other matters.
5. The Public Defender's file on LENNON contained:
   a) Date of birth
   b) Social Security number
   c) Aliases
   d) Marital (discord) status
   e) Employment history
   f) Leads to good and bad character witnesses
   g) Previous neighborhood of defendant's residence
   h) Military service information such as dishonorable or undesirable discharge, if any

i) Accurate prior record
j) Physical and mental health defects
k) Drug usage history (type, length, last use)
l) Probation history
m) Parole history
n) Correctional history
o) Other formal pending charges (and the details of that offense), warrants and detainers
p) Other potential charges with details

LENNON had the right to expect this information maintained on him by the public defender would not be used against him by Balter, even as he needed Balter to seek out and find this information for use in cross examining Pellitera

6. LENNON was entitled to rely on professional advice of Balter given free of reservations stemming from his representation of Pellitera

7. LENNON had a right to expect vigorous cross examination by Balter of Pellitera in *People v. Lennon*

8. LENNON had the legitimate right to expect Balter to negotiate a good plea if that was in Lennon's best interest

9. LENNON had the right to expect undivided loyalty from Balter and the public defender's office

10. LENNON had the right to expect that within the bounds of the lawBalter would use whatever impediments were available to prevent Pellitera from testifying adversely against Lennon and to assert available legal obstacles to prevent either a grant of immunity or other concessions which would hurt Lennon's chance for acquittal

11. LENNON could expect that Balter, ably looking at all of his tangential legal rights, would take all necessary steps to prevent adverse insurance consequences or civil liability for Lennon

PELLITERA'S LEGITIMATE EXPECTATIONS FROM COUNSEL

1. PELLITERA was entitled to loyal and zealous representation by Balter DR5-101; DR5-105; DR7-101
   Yet:
   a) Pellitera was the chief prosecution witness in *People v. Lennon.*
   b) Protecting Pellitera meant securing Lennon's conviction.
   c) Protecting Pellitera meant assisting him to help the district attorey achieve an unassailable conviction on the criminal charges for which Lennon was a defendant.

2. PELLITERA was entitled to a lawyer who would unearth facts and circumstances regarding Lennon that would help Pellitera in his plea for leniency.

3. PELLITERA was entitled to a lawyer who would investigate and reveal information useful to the district attorney in his prosecution of Lennon.

4. PELLITERA was entitled to rely on the attorney-client evidentiary privilege as to certain matters and upon the proscription against revelation of secrets and confidences by Balter as to other matters.

5. The Public Defender's file on PELLITERA contained:
   a) Date of birth
   b) Social Security number
   c) Aliases
   d) Marital (discord) status
   e) Employment history
   f) Leads to good and bad character witnesses
   g) Previous neighborhood of defendant's residence
   h) Military service information such as dishonorable or undesirable discharge, if any
   i) Accurate prior record
   j) Physical and mental health defects
   k) Drug usage history (type, length, last use)
   l) Probation history

m) Parole history
n) Correctional history
o) Other formal pending charges (and the details of that offense), warrants and detainers
p) Other potential charges with details

PELLITERA had the right to expect this information maintained on him by the public defender would not be used against him by Balter, even as he needed Balter to seek out and find this information for use by the district attorney against Lennon as a means of securing a good disposition of his own case

6. PELLITERA was entitled to rely on professional advice of Balter given free of reservations stemming from his representation of Lennon

7. PELLITERA had a right to be shielded by Balter from vigorous cross examination, to be counseled by Balter not to answer questions, to be advised what might or might not incriminate him upon cross examination and to secure Balter's legal advice and assistance concerning his direct examination in *People v. Lennon*

8. PELLITERA had an interest in taking credit for having Balter help him help secure Lennon's conviction

9. PELLITERA had the right to expect Balter and the public defender's office to make the best "deal" for him in *People v. Pellitera* based on his testimony against Lennon in *People v. Lennon*

10. PELLITERA had the right to expect Balter to secure immunity or other concessions in the event of possibly incriminating or embarrassing testimony and to assure the procedural integrity of the proceedings in which he, Pellitera, was to give direct testimony against Lennon

11. PELLITERA could expect that Balter, ably looking at all of his tangential legal rights, would take all necessary steps to prevent adverse insurance consequences or civil liability for Pellitera